80-587

Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

No.

UNITED STATES OF AMERICA

versus

FOSTER LEROY STOTTS,

Petitioner

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Whether the use of the word "endeavor" in a criminal statute (18 U.S.C. §2511 (1)(a)) violates the due process clause of the Fifth Amendment to the United States Constitution by rendering the statute vague and overbroad.

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeal for the Fifth Circuit entered on September 4, 1980 in the matter

entitled "United States of America versus Foster Leroy Stotts," Number 79-5667 on the docket of said court which denied petitioner's application for a rehearing and thereby affirmed the jury verdict of the United States District Court from the Middle District of Louisiana which found petitioner guilty of violating 18 U.S.C. §2511 (1) (a) which prohibits an endeavor to intercept wire or oral communications.

CITATIONS TO OPINIONS BELOW

Unpublished opinion of Fifth Circuit Court of Appeal affirming jury verdict, 623 F. 2d 710 (7/21/80).

Denial of Application for Rehearing—unreported at this date.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit affirming the jury verdict in the United States District Court for the Middle District of Louisiana was entered on July 21, 1980. An application for rehearing was timely filed by petitioner and the United States Court of Appeal denied said application on September 4, 1980.

The jurisdiction of this Honorable Court is invoked under 28 U.S.C. §1254, petitioner claiming that a United States statute is invalid on the ground that it is repugnant to the Due Process Clause of the Fifth Amendment to the United States Constitution and, petitioner claiming a right under the Fifth Amendment of the United States Constitution.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

1) Fifth Amendment to the Constitution of the United States which provides:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law."

2) 18 U.S.C. §2511 (1) (a), which provides:

> § 2511. **Interception and disclosure of wire or oral communications prohibited.**
>
> "(1) Except as otherwise specifically provided in this chapter [18 U.S.C. §§2510 et seq.] any person who—
>
> "(a) willfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire or oral communication shall be fined not more than $10,000 or imprisoned not more than five years, or both."

STATEMENT OF THE CASE

Petitioner was indicted in the United States District Court for the Middle District of Louisiana for violation of 18 U.S.C. §2511(1)(a).

The evidence at trial indicated that on March 17, 1979 defendant was in the area of Denham Springs, Louisiana where he encountered Joseph Walters, a telephone repairman (tr. 153). Walters later agreed to help him arrange the wiring outside of a vacant house so that defendant could in-

tercept and record telephone conversations to and from that house (tr. 157). Defendant was planning on employing a telephone hookup by combining a cassette recorder with a "switch box."

It was not established at trial that the connection Walters worked on was capable of being used. At any rate, defendant connected the recorder and switching box to the connector in the house, tested the equipment and found it did not work (tr. 173). After this he left the premises and did not return until after his arrest by F.B.I. agents.

On August 31, 1979 defendant was tried before a jury and found guilty in the United States District Court for the Middle District of Louisiana. After the verdict of guilty the defendant moved for a new trial which was denied.

Defendant appealed to the United States Court of Appeal, Fifth Circuit where the District Court verdict was affirmed on July 21, 1980. A petition for rehearing was denied on September 4, 1980.

REASONS FOR GRANTING THE WRIT

Due process and fair play require that the terms of a penal statute creating an offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties.

Buckley v. Valeo, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed 2nd 659, (1976)

Connally v. General Construction Co., 269 U.S. 385, 46 S.Ct. 126 (1925)

It is the contention of the petitioner that the word "endeavor" as used in 18 U.S.C. § 2511(1)(a) renders the statute unconstitutionally vague and overbroad so that one cannot reasonably determine the scope of conduct which the statute proscribes.

The difficulty arising from the use of the word "endeavor" is demonstrated by the following quotation from the prosecutor's opening statement.

> "Now the technical word you have heard on the indictment or one of the technical words is 'endeavor.' For now, we're comfortable to use the word 'attempt,' and occasionally you will hear me slip in and out of 'endeavoring' and 'attempting.' Later the judge will give you explicit instructions on that; but just remember that for now, Stotts is charged with **attempting** to wiretap and he's charged with paying someone else in that attempt or endeavor. . . ."
>
> (tr. 6) (emphasis added)

Although the concept of "attempt" is familiar and used widely throughout criminal law, the concept of endeavor is not so clear and denotes a much broader scope than that of "attempt." It is so much broader that to determine at what point one becomes guilty of an "endeavor" to intercept wire communications requires pure conjecture and guesswork. For example, if a person formed an intent to intercept wire communications, and then contacted a source of supply for the required equipment, but found none, or subsequently changed his mind and decided against such a course of action, would that person be guilty of an endeavor? If that person set out with the required equipment, got into his car, and drove about seeking to find an opportunity to intercept communications,

but never actually made an "attempt" to wiretap, (i.e., by trying to connect his equipment to telephone facilities), is he guilty of an endeavor? In the instant case, where would the Government place culpability? When defendant drove from Arkansas with a tape recorder and switching box in his car, did that constitute an "endeavor," or did the alleged endeavor begin by placing these objects in the car? Further along in the chronology of events, would it be possible for a person to form an intent, perform some innocuous act consistent therewith, abandon the plan, later re-form his intent, perform another act, and have committed two "endeavors"? And if so, then how far must such conduct be carried in order to create an endeavor? Phrased differently, it is impossible to discern at what point a person may abandon preparations for an interception of wire communications and still remain innocent of the "endeavor" of 18 U.S.C. § 2511(1)(a).

The Court of Appeal stated in its opinion that the use of "endeavor" in the statute made it uncertain. The court was inclined to declare the statute unconstitutional but was constrained from doing so by a former Supreme Court case which was interpreted as upholding the use of the word "endeavor." See that portion of the opinion quoted below:

> "Were we writing on a clean slate we seriously would consider holding that 'endeavor' is too vague and uncertain to pass constitutional muster.[1] But we are not free to do so. The Supreme Court upheld use of the word 'endeavor' in *Osborn v. United States*, 385 U.S. 323, 87 S. Ct. 429, 17 L.Ed. 2d 394 (1966).
>
> > "1. Evidence of the practical difficulty the use of the word 'endeavor' occasions is found in this record. The exceedingly able trial judge felt the necessity to define the word. He instructed the jury that an

> endeavor is 'an attempt' and 'a try.' We know that endeavor is something less than an attempt as that word is typically used in the context of criminal statutes. How much less is not clear. We note this practical problem to underscore what we perceive to be the uncertainty occasioned by the word."

In all deference to the Court of Appeal and its decision, the *Osborn* case, cited as precedent for upholding the constitutionality of the use of the word "endeavor," does not address the issue of vagueness relative to the use of that word.

Osborn involved 18 U.S.C. §1503 which makes it a crime to "endeavor to influence" a juror. Defendant contended that his conviction be set aside because his conduct did not constitute a violation of the statute. The basis of his argument was that the informer he contacted never approached the juror and never intended to. So defendant argued any endeavor on his part was impossible of accomplishment and therefore not in violation of the statute.

The court in *Osborn* never addressed the constitutionality of the statute. Indeed they were never asked to as defendant's strained defense was based on the confusion of the statute caused by using the word "endeavor."

In *Bowie v. City of Columbia*, 84 S. Ct. 1697, 378 U.S. 347 (1964), it was said:

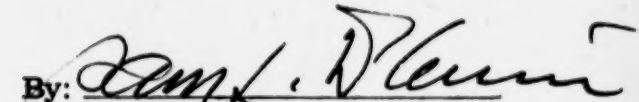
> "A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law."

18 U.S.C. § 2511(1)(a) is just such a statute. There have been, to our knowledge, no judicial constructions of the word "endeavor" as used in this section. The crime charged therein is one which, among other things, requires planning and preparation, during which the requisite intent may not be present. Under the general law of attempt, preparation does not constitute a crime. While it is acknowledged that "endeavor," "attempt," and "preparation" have different meanings, it is submitted that the common man is not and cannot be expected to be privy to these vagaries, and thus where a person might reasonably believe himself to be only in the preparatory stage, he could in fact be engaging in an "endeavor" which would subject him to criminal liability under this statute.

In light of the *Osborn* case and the support which the Court of Appeal expressed for petitioner's contention and the reasoning discussed above we urge this Honorable Court to find that Section 2511(1)(a) of Title 18 United States Code to be violative of the due process clause of the Fifth Amendment to the United States Constitution. We also ask that the conviction in this case be reversed.

Respectfully submitted:

D'AMICO & CURET

By: 

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 79-5667

Summary Calendar*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

FOSTER LEROY STOTTS,
Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF LOUISIANA

(JULY 21, 1980)

Before GEE, RUBIN and POLITZ, Circuit Judges.

POLITZ, Circuit Judge:

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Foster Leroy Stotts appeals his conviction, by jury, of violating 18 U.S.C. § 2511(1) (a), asserting that the district court erred in: (1) denying his motion to suppress evidence seized during the execution of a search warrant, (2) denying his motion to dismiss the indictment which motion claimed that 18 U.S.C. §2511(1)(a) is unconstitutionally vague and overbroad, (3) refusing to give a portion of his requested jury instruction on intent, and (4) denying his motions for a mistrial and a new trial. We affirm.

The indictment charged that Stotts "did endeavor to intercept and did procure another person to endeavor to intercept, by means and use of an electronic device, wire communications made and sent on March 21, 1979, by and between persons over a telephone. . . ."

Viewing the evidence and all reasonable inferences to be drawn from that evidence in a light most favorable to the government, as we are constrained to do by *Glasser v. United States,* 315 U.S. 60, 62 S.Ct. 467, 88 L.Ed. 680 (1942), we find that Stotts placed an electronic recording device with an actuating mechanism on telephone wires serving the residence of a man named Irwin Sutton and that he sought, secured and paid for the assistance of a telephone company worker to help him "tap" Sutton's telephone lines.

Fourth Amendment — Suppression

Stotts asserts that the cassette tape recorder used in his electronic surveillance was not properly described in the search warrant authorized seizure of a "device, black in color, approximately fourteen (14) inches by nine (9) inches used to record intercepted wire communications." Stotts argues that the seized device differed in appearance from the one described in the warrant and that it was not used exclusively

* Fed.R.App.P. 34 (a); 5th Cir. R. 18.

for recording intercepted wire communications. Counsel demonstrate ingenuity and perspicacity, but we cannot accept the arguments advanced. The description used in the warrant does not require that the device be one used **exclusively** for the interception of wire communications and the differences between the unit as described in the warrant and that seized are inconsequential. *See United States v. Rytman*, 475 F.2d 192 (5th Cir. 1973) (error in serial number of motor compressor). *See also United States v. Prewitt*, 553 F.2d 1082 (7th Cir.) *cert. denied*, 434 U.S. 840 (1977); *United States v. Johnson*, 541 F.2d 1311 (8th Cir. 1976) ("paraphernalia"); *Quigg v. Estelle*, 492 F.2d 343 (9th Cir.), *cert. denied*, 419 U.S. 848 (1974) ("any .22 caliber pistol"). Moreover, admission of the tape recorder into evidence would have been allowable under the "plain view" doctrine. The device was in the open, in plain sight, wired up, when the search warrant was executed. *Johnson, supra*, at 1316.

Unconstitutionality of Statute

The most serious issue Stotts advances is the question of the constitutionality of the statute. Stotts claims that the word "endeavor" is vague and overbroad. Counsel invite us to contemplate situations in which one would be guilty of an "endeavor" for what otherwise would be innocent acts. More importantly, counsel outlines situations in which a reasonable person would be uncertain whether he was committing a crime. It is well-established that a statute forbidding an act "in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application . . . violates the first essential of due process of law." *Connally v. General Construction Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 70 L.Ed. 322 (1926).

Were we writing on a clean slate we seriously would consider holding that "endeavor" is too vague and uncertain to pass constitutional muster.[1] But we are not free to do so.

The Supreme Court upheld use of the word "endeavor" in *Osborn v. United States*, 385 U.S. 323, 87 S.Ct. 429, 17 L.Ed. 2d 394 (1966). *Osborn* involved 18 U.S.C. § 1503, which makes it a crime to "endeavor to influence" a juror. *See also United States v. Russell*, 255 U.S. 138, 41 S.Ct. 260, 65 L.Ed. 553 (1921).

Following the Supreme Court's teachings in *Osborn* and *Russell* we hold that the use of the word "endeavor" in 18 U.S.C. §2511(1)(a) does not render it unconstitutionally vague or overbroad.

Jury Instruction

Stotts contends that the court erred in refusing to use the following sentences as part of the charge on willfulness:

> It generally connotes a voluntary violation of a known legal duty. Defendant's conduct is not willful even if you find that he acted out of negligence, inadvertence, accident or reckless disregard for the requirements of law, or due to his good faith misunderstanding of the requirement of the law.

Having reviewed the entire charge, we are convinced that the district court adequately instructed the jury. Were it otherwise, we note that Stotts did not object timely. Refusal to give the quoted portion of the requested charge did not constitute plain error that significantly affected Stotts' substantial rights. We therefore would not be in a position to consider the assigned error. Fed.R.Crim.P. 52(b); *United States v. Wolfe*, 611 F.2d 1152 (5th Cir. 1980); *United States*

1. Evidence of the practical difficulty the use of the word "endeavor" occasions is found in this record. The exceedingly able trial judge felt the necessity to define the word. He instructed the jury that an endeavor is "an attempt" and "a try." We know that endeavor is something less than an attempt as that word is typically used in the context of criminal statutes. How much less is not clear. We note this practical problem to underscore what we perceive to be the uncertainty occasioned by the word.

v. Spiegel, 604 F.2d 961 (5th Cir. 1979); *United States v. Hemming*, 592 F.2d 866 (5th Cir. 1979).

Mistrial — New Trial

Stotts claims that the district court erred in refusing to grant a mistrial after the prosecutor punctuated his cross-examination by pointing out discrepancies between Stotts' trial testimony and the testimony he gave at the hearing on his motion to suppress, in these words: "So you're lying now so it will help your story?"

This question was inappropriate. A prosecutor who would communicate to the jury indications of lying should convey his message in a less offensive manner. The question, however, in the setting as here posed, is not grounds for reversal. *See United States v. Beechum*, 582 F.2d 898 (5th Cir. 1978) (en banc).

We also find no merit in Stotts' claim that he should be granted a new trial because the government was allowed to adduce evidence concerning industrial espionage. The evidence was admissable under Fed.R.Evid. 401, 402 and 404(b). Stotts asserts that the questions "were allowed over defense objection on the prosecution's assurances that evidence would later be introduced to show industrial espionage as a motive." The record does not support this assertion. Stotts may not now complain about the admission of this evidence. Fed.R. Evid. 103 (a)(1).

The conviction is AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 79-5667

UNITED STATES OF AMERICA,

Plantiff-Appellee,

versus

FOSTER LEROY STOTTS,

Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF LOUISIANA

ON PETITION FOR REHEARING
(September 4, 1980)

Before GEE, RUBIN and POLITZ, Circuit Judges.
PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

HENRY A. POLITZ
UNITED STATES CIRCUIT JUDGE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing petition has been served on the Honorable Donald L. Beckner, United States Attorney and The Solicitor General, U. S. Department of Justice, by depositing the same in the United States mail, with first class postage, prepaid, properly addressed to the respective addressees.

Baton Rouge, Louisiana, this 9th day of Oct., 1980.

Sam J. D'Amico
Attorney for Petitioner